

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. S-1491-A

PETITION OF KFC OF AMERICA, INC.
(Hearing held March 20, 2002)

OPINION OF THE BOARD
(Effective Date of Opinion: May 2, 2002)

This is a petition for a special exception modification pursuant to Section 59-G-1.3 (c) of the Zoning Ordinance to transfer the special exception to KFC of America, Inc. and to permit the following modifications to the existing special exception for a drive-in restaurant located at 26141 Ridge Road, Damascus, Maryland:

1) Structural modifications to the roof line to create the prototypical KFC/Taco Bell exterior elevation; 2) Relocate the existing drive-thru window and remove existing drive-thru overhang; 3) Post prototypical KFC/Taco Bell exterior signs, including a new two-sided main pylon sign consisting of approximately 24 square feet per side, and a maximum height of 8 feet; 4) Add internally illuminated awnings along the south and west faces of the building; 5) Refurbish the concrete patio space for outdoor seating; 6) Clean and repaint the garbage dumpster area at the rear of the property; 7) Replace the exterior coolers on the rear of the building with a larger (11' x 28' x 8'6") facility; 8) Relocate the existing transformer and adjust loading dock; 9) Add one light pole and upgrade existing light fixtures; 10) Install a standard approved grease trap; 11) Add landscaping; 12) Install outdoor seating on existing patio; and 13) Change hours of operation to: Hours of operation shall be Sunday through Thursday, 10:30 a.m. to midnight and Friday and Saturday, 10:30 a.m. to 1:00 a.m.

Pursuant to §59-A-4.41 of the Zoning Ordinance, the Board of Appeals held a public hearing on March 20, 2002 in this case.

Emily J. Vaias and Nathan J. Greenbaum of Linowes and Blocher LLP appeared on behalf of KFC of America, Inc. (the "Petitioner"). Six (6) witnesses were called by Petitioner in support of the application: (1) David A. Hamil, PE, engineer and site plan designer; (2) Stacey A. McArthur, R.L.A. landscape architect and site designer; (3) Donald E. Lipscomb, AIA, architect; (4) Donald L. Klingemann PE, RA, lighting consultant; (5) C. Craig Hedberg, traffic consultant; and (5) Isaac Showell, Petitioner representative and construction manager.

Judy Daniel, AICP, Department of Park and Planning, participated in the proceedings recommending support of the Petitioner's request to modify this special exception with conditions as specified in her memorandum to the Board dated March 11, 2002.

Thomas I. Miner, Chief, Department of Housing and Community Affairs, Division of Community Development, also participated in the proceedings with regard to the application of the Damascus Streetscape Guidelines to the subject special exception.

Decision of the Board: Special exception modification and request for transfer
GRANTED, subject to the Conditions enumerated below.

EVIDENCE PRESENTED

1. The subject property is a subdivided lot identified as Parcel J at Plat Book 152, Plat No. 17374, and consisting of 34,547 sq. ft. located at 26141 Ridge Road, Damascus, Maryland (the "Property"). The Property is in the C-2 (General Commercial) Zone which permits by special exception drive-in restaurants pursuant to Section 59-C-4.2 of the Zoning Ordinance.
2. Petitioner is the contract purchaser under a sales contract dated December 5, 2001, from the McDonald's Corporation.
3. Petitioner seeks to continue the drive-in restaurant use originally authorized under special exception S-1491, subject to minor modifications the latest of which occurred in 1997. Petitioner also seeks to transfer the current special exception from McDonald's Corporation to KFC of America, Inc.
4. The Property is currently owned by the McDonald's Corporation. The original special exception was approved in 1988 for the Marriott Corporation to operate a drive-in Roy Rogers Family Restaurant. In 1989 the special exception holder sought and was granted permission to extend the time to establish the special exception use. In June 1991 the Board approved the transfer of the special exception from the Marriott Corporation to the Hardee's Food Systems and approved as a minor modification (without a public hearing), the addition of an outdoor playground. In July 1991 the Board suspended its Resolution approving the addition of the playground, subject to compliance with the approved landscape plan and participation in the Damascus Streetscape Plan. In 1992, the Board reinstated the approval of the outdoor playground. In 1997 the Board approved the transfer of the special exception to McDonald's Corporation and various minor changes to the building, site and operating conditions.
5. Petitioner is seeking to continue the operation of a drive-in restaurant on the Property with some minor operational and architectural changes. With regard to the operations, the proposed KFC/Taco Bell Restaurant will not have breakfast and therefore will not have morning hours like the prior McDonald's. The KFC/Taco Bell will be open from 10:30 a.m. until midnight Sunday through Thursday, and 10:30 a.m. until 1:00 a.m. on Friday and Saturday.
6. The roof of the existing building will be removed but the walls will remain, and the new roof will be consistent with the existing wall materials. The new coolers to be added to the rear of the building, and which will replace the existing coolers, will be covered with a material that also matches the existing building materials. The installation of the new coolers, approximately 28 feet by 11 feet in size, will require moving the existing utility transformer about 10 feet to the east to a safer and more accessible location for service. The standard KFC/Taco Bell, internally illuminated awnings will be added to the building.
7. The existing landscaping will be enhanced with additional plantings, and KFC/Taco Bell signage will replace existing signage and provide sufficient identification for the restaurant and direction for customers. The freestanding sign on Ridge Road will be no more than 8 feet in height and the face of the sign will be 4 feet by 6 feet.
8. The prior play area/outdoor seating area will be cleaned up and new tables and chairs/benches installed. This area combined with the indoor space creates a total patron area of 1,784 square and a requirement for 45 parking spaces. Parking for 52

cars is provided on the Property and pursuant to a parking easement on the adjacent property.

9. The existing light poles will be used to illuminate the Property; however, the fixtures and heads will be replaced where required, and one additional light pole will be added along the drive thru lane in order to better distribute the light throughout the parking lot and prevent glare.
10. The original special exception approved 38 employees with 2 shifts per day and 8 to 10 employees per shift, all arriving and departing during non-peak hours. The proposed KFC/Taco Bell will comply with this condition.
11. The area surrounding the Property is commercial in nature. Immediately behind the Property and sharing an entrance drive (as it has been since the special exception was first approved) is a small office/retail center known as the High Point Center. Just to the south of the Property is Weis Market Shopping Center. To the north is a Montgomery County Department of Public Works and Transportation service yard and across Ridge Road are retail stores.
12. The Property is currently in compliance with the Damascus Streetscape Plan and will continue to be so upon completion of the KFC/Taco Bell restaurant and the improvements proposed by the Petitioner. Thomas Miner confirmed this situation, and the County's satisfaction with the streetscape along Ridge Road in front of the Property.
13. Circulation into and around the Property will be safe and efficient and no changes are proposed to the existing design.

FINDINGS OF THE BOARD

Special Exception General Standards

The Board finds that the modification meets the general standards for granting special exceptions found in §59-G-1.2 as follows:

§59-G-1.2.1 Standard for Evaluation

A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.

The proposed modifications to the Special Exception will not impact the general functioning of the special exception use, and there will be no adverse effects on the nearby properties or the general neighborhood caused by any inherent or non-inherent effects of the use. The Property is surrounded by other commercial uses and they complement one another.

§ 59-G-1.21 General Conditions

A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

- (1) Is a permissible special exception in the zone.*

Drive-in restaurants are permitted by special exception in the C-2 Zone pursuant to Zoning Ordinance Section 59-C-4.2.

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

The continued use of the Property as a drive-in restaurant by the Petitioner with the proposed modifications complies with the standards and requirements set forth for the use in section 59-G-2.16 entitled "Drive-in Restaurants" as set forth more fully below.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny a special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

The continued use of the Property by Petitioner, with the modifications, remains consistent with the applicable Damascus Master Plan, as well as the Streetscape Guidelines.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

The restaurant use will continue to be in harmony with the surrounding commercial neighborhood and its intensity and character of activity will not be changed. The proposed architectural changes to the building will not change the character of the building and its design, scale and bulk will continue to be in harmony with the commercial neighborhood. The traffic and parking conditions will not be changed by the KFC/Taco Bell, except that the new restaurant will not have morning breakfast hours and will therefore not generate any morning peak hour traffic trips.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The modifications will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the neighborhood. The new restaurant will help to improve the vitality of the commercial neighborhood.

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The modifications will not alter the use of the Property nor add any objectionable noise, vibrations, fumes, odors, dust, glare or physical activity. The new restaurant will operate in much the same way as the prior restaurants. In addition, the lighting plan for the new restaurant will greatly improve the lighting conditions on the Property by better distributing the light and preventing glare or unnecessary illumination on and around the Property.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with recommendations of a master or sector plan do not alter the nature of an area.*

Not applicable because Property is in commercial zone and surrounded by commercial uses.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The modifications do not change the existing use and will not adversely affect residents, visitors or workers in the area. The modification to the lighting plan will ensure the safety of visitors and workers while providing a better overall distribution of light. The enlarged coolers on the rear of the building will better allow workers to access food items in a safe and efficient manner.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

The new restaurant will continue to be adequately served by all public facilities and services. The existing facilities will serve the use and the only changes proposed are construction of a new grease drain which meets the current WSSC standards, and relocation of the transformer along the rear of the building 10 feet to the east.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.*

The Property was subdivided and recorded in 1989, so no preliminary plan is required.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

The proposed modifications do not change the existing vehicular and pedestrian access points into the Property. The improved lighting and signage will enhance the safety of pedestrians and vehicles in and around the Property. The proposed KFC/Taco Bell will not generate any more traffic than the prior approved restaurant. Therefore, the proposed special exception use will have no detrimental effect on the safety of vehicular or pedestrian traffic.

Special Exception - Specific Standards

The Board finds that the modification meets the applicable specific standards and requirements of §59-G-2.16 as follows:

§59-G-2.16: Drive-in Restaurants.

A drive-in restaurant may be allowed, upon a finding, in addition to findings required in division 59-G-1, that:

- (a) *The use will not constitute a nuisance because of noise, illumination, fumes, odors or physical activity in the location proposed.*

The proposed KFC/Taco Bell will not create a nuisance in that there is limited noise from the use and the lighting plan has been designed to reduce glare and unnecessary illumination. Fumes and odors from the restaurant will not be objectionable and the physical activity on the Property will be similar to that of the previous restaurant.

- (b) *The use at the proposed location will not create a traffic hazard or traffic nuisance because of its location in relation to similar uses, necessity of turning movements in relation to its access to public roads and intersections, or its location in relation to other buildings or proposed buildings on or near the site and the traffic patterns from such buildings or cause frequent turning movements across sidewalks and pedestrian ways, thereby disrupting pedestrian circulation within a concentration of retail activity.*

The proposed KFC/Taco Bell will not alter the existing circulation pattern on the Property, and does not create a traffic hazard or nuisance for vehicles and/or pedestrians. The design of the parking lot does not disrupt pedestrian circulation and the sidewalk connection from Ridge Road to the building will remain. The restaurant's relation to the surrounding commercial uses is complementary, and the shared access point onto Ridge Road with the High Point Center helps reduce turning movements from the public roadway.

- (c) *The use of the proposed location will not preempt frontage on any highway or public road in such manner so as to substantially reduce the visibility and accessibility of an interior commercial area zoned or proposed for commercial use which is oriented to the same highway or public road.*

The proposed modifications to the building will not reduce the visibility of or accessibility to the internal retail/office center, High Point Center. The Property shares an access easement with High Point Center, which will remain accessible.

- (d) *When such use abuts a residential zone or institutional premises not recommended for reclassification to the commercial or industrial zone on an adopted master plan and is not effectively screened by a natural terrain feature, the use shall be screened...*

Not applicable as the Property does not abut a residential zone or institutional premises.

- (e) *Product displays, parked vehicles and other obstructions which adversely affect visibility at intersections or at entrances and exits to and from such use, are prohibited.*

The Petitioner will not install any such obstructions and the existing parking lot is designed to satisfy this condition.

- (f) *Lighting is not to reflect or cause glare into any residential zone.*

The Property does not adjoin a residential zone, but the proposed new lighting will have fixtures and wattages which reduce glare and reflection onto other properties.

- (g) *When such use occupies a corner lot, the ingress or egress driveways shall be located at least 20 feet from the intersection of the front and side street lines of the lot...*

Not applicable, as the Property is not a corner lot.

Conditions

Based upon the foregoing, the Board grants the transfer of the Special Exception from McDonald's Corporation to KFC of America, Inc. and the modifications to Special Exception S-1491-A, subject to the following conditions:

1. All terms and conditions of the Special Exception approved in 1997 by the Board remain in full force and effect, except as modified herein.
2. The Petitioner is bound by all submitted statements and plans, and construction of the modifications will be in accordance with Exhibit Nos. 24 (Revised Site Plan), 27 (Revised Landscape Plan), 28 (Proposed Sign), 31 (Revised South & West Elevations), 32 (Revised Floor Plan), 33 (Revised East and North Elevations) and 35 (Revised Photometric and Lighting Plan) (as modified below).
3. Compliance with any requirements of the Damascus Streetscape Guidelines in coordination with Montgomery County Department of Housing and Community Development; especially that the condition of the street trees be evaluated in the Spring, and if any of the trees have died, they should be replaced with new trees in accord with the Damascus Streetscape Guidelines.
4. The main entrance sign must be no higher than 8 feet and no wider than 6 feet as shown on Exhibit 28.
5. The roof of the "cupola" must be a solid red standing seam metal roof and may not be internally illuminated.
6. The lighting on the Property shall comply with Exhibit 35 (Lighting and Photometric Plan).
7. Hours of operation are limited to Sunday through Thursday 10:30 a.m. to midnight, and on Friday and Saturday 10:30 a.m. to 1:00 a.m.
8. The restaurant may have no more than 38 employees with 2 shifts per day, and 8-10 employees per shift.
9. The new coolers being installed must be clad in EFIS (Exterior Finish Insulation System) carrera marble stucco, or some other similar system or material which matches the texture and color of the existing concrete block on the building and is consistent with the Elevations.

On a motion by Louise L. Mayer, seconded by Donna L. Barron, with Chairman Donald H. Spence, Jr., Allison Ishihara Fultz and Angelo M. Caputo in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the resolution required by law as its decision on the above-entitled case.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 2nd day of May, 2002.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and any party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedures.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the Zoning Ordinance). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four month period within which the special exception granted by the Board must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permit for a Special Exception.